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335-386—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1022

WILLIAM PRONER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. 1a–7a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. 9a–10a) was entered on January 10, 1969, and the petition for a writ of certiorari was filed on February 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conviction on Counts 2 and 3 (relating to 1959) may have been based upon challenged evidence relating to disallowed business deductions.

2. Whether the prosecutor committed reversible error in his summation by vouching for the credibility of a government witness, after the defense had alleged in its summation that the prosecutor knew the witness was lying on the witness stand.

3. Whether the concurrent sentence doctrine enunciated in *Hirabayashi* v. *United States,* 320 U.S. 81, 105, and subsequent cases, applied by the court below in the instant case, is an unconstitutional deprivation of due process or constitutes an unsound rule of appellate review.

STATEMENT

1. In April, 1966, petitioner and his brother-in-law, one Kaplan, were indicted in eight counts for (1) wilfully attempting to evade petitioner's 1959 income tax in violation of 26 U.S.C. 7201 (count 2); (2) wilfully filing false statements of annual income on behalf of petitioner for the years 1959 through 1964 in violation of 26 U.S.C. 7206(1) (counts 3–8); and (3) conspiring to commit the offenses charged in the other seven counts and to defraud the United States of payments due under the terms of a compromise agreement with the Internal Revenue Service, in violation of 18 U.S.C. 371 (count 1). After a jury trial in the United States District Court for the Southern District of New York, the defendants were found guilty on all counts; petitioner was sentenced to concurrent three-year prison terms on each of the eight counts (R. 896–897).[1] On

[1] The designation "R." refers to the five-volume transcript of proceedings at the trial, on file with this Court.

appeal, the court of appeals reviewed and affirmed the convictions on counts 2 and 3 of the indictment, both relating to the year 1959. It then held that "[b]ecause the conviction on counts 2 and 3 is unrelated to the evidence challenged by Proner and because the sentences on all counts were concurrent, the judgment of conviction must be affirmed regardless of the validity of the conviction on the other counts" (Pet. App. 6a).

2. During the years 1942 through 1945 petitioner accumulated an unpaid income tax liability of over one million dollars, which was still outstanding in 1955 when petitioner began to negotiate a compromise agreement with the Internal Revenue Service. In November, 1957, a compromise was agreed upon by the Service, under which petitioner was obliged to pay to the Service $17,500 in cash and a percentage of his annual income during the years 1956 through 1965 (R. 37–43). The agreement also provided that, in the event petitioner became a stockholder in a closely held corporation, his "annual income" was to include "his proportionate share of corporate net income in excess of $5,000 * * * plus all nontaxable income and minus federal income tax due for the year in question and paid" as well as petitioner's proportionate share of corporate profits not distributed to him. Petitioner was obliged to file a sworn Statement of Annual Income, as defined in the agreement, yearly (R. 44–45).

At the time petitioner negotiated the compromise agreement with the Service he owned a 40 percent interest in a corporation known as Palmer Import Trading Co., the "old Palmer." He had invested

$25,000 in the company when it was organized in 1955, as had co-conspirator Aaron Schur. Schur owned 40 percent of the old Palmer through his wholly owned S & E Novelty Co. (R. 60–62). In May, 1956, Schur and petitioner liquidated the old Palmer and made it a division of S & E Novelty Co., the "Palmer Division" (R. 64–66). Petitioner received about $22,000 as a return on his investment of $25,000 (R. 69–71, 346–350). Nonetheless, he was to continue to run the business and, pursuant to a secret oral agreement, was to receive 40 percent of the profits of Palmer Division plus an amount (which was about the amount of income exempt from taxation under the compromise agreement) of $150 a week for salary (R. 67, 90). At petitioner's request the agreement was not reduced to writing. Schur testified that petitioner had told him the reason for his request was the "many * * * troubles that [petitioner] has or expected to have" concerning his taxes (R. 68–69).

The Palmer Division operated successfully from May, 1956, to February, 1959, although no distributions of profit were made to petitioner (R. 94–95, 98, 351–357). The Palmer Division was then liquidated in March, 1959, and Schur and petitioner agreed that petitioner would receive his accumulated profits in the form of inventory and some cash, so that he could continue the business. In the ensuing transactions petitioner paid only $124,236.78 for inventory which had cost the Palmer Division $166,713.27; what petitioner did not select was retained by S & E Novelty. In addition, petitioner received $25,000 in the form of two checks, one for $9,707.10 ($12,000 less taxes)

made to petitioner's order and one for $10,527.10 ($13,000 less taxes) made to the order of Kaplan, the Palmer Division's bookkeeper and petitioner's brother-in-law.[2] With this inventory and cash, petitioner set up a new Palmer Import and Trading Co., the "new Palmer" (R. 95–96, 134–139, 153–162, 403–404, 408–409). Petitioner paid for the inventory by a promissory note of the new Palmer in the amount of $110,000 and a $14,236.78 trade acceptance (R. 163–171). Although nominal ownership of the new Palmer was in Kaplan, in fact Kaplan remained a bookkeeper and petitioner ran the business (R. 138–139, 371, 406, 424). In August, 1959, half of the new Palmer's stock was purchased by a third party (R. 376–377, 405–407).

The government's proof of tax evasion for 1959 (count 2) was based on petitioner's failure to report the Palmer Division's profits, distributed to him in 1959 in the form of inventory and the two checks (R. 479–585). The charge of wilfully filing a false Statement of Annual Income for 1959 (count 3) was based upon petitioner's failure to include in the Statement his share of the 1959 profits of the Palmer Division. No proof of unsubstantiated business expenses of the new Palmer was introduced on these counts.

ARGUMENT

1. In declining to review counts 1 and 4 through 8, the court of appeals found it unnecessary to pass on an allegation that the government had failed to prove

[2] This check was supposedly for Kaplan's future services to S & E Novelty as assistant general manager. Schur testified that Kaplan was not hired as assistant general manager.

that petitioner had not spent for business purposes money he had received from the new Palmer allegedly for business expenses, but deduction of which was disallowed to new Palmer for lack of substantiation, and that such proof was necessary to a guilty finding. Petitioner had argued that this defect infected all counts on which he was convicted. The court found, however, "[n]o evidence involving unsubstantiated business expenses was presented with respect to Proner's 1959 income tax return (the subject of count 2) and his 1959 Statement of Annual Income (the subject of count 3)" (Pet. App. 4a–5a), and that "the judge's charge cannot properly be read as suggesting that such evidence was presented" (Pet. App. 6a). In arguing that the jury's verdict on counts 2 and 3 may have been based upon the evidence of the disallowed business deductions, petitioner now seeks to relitigate that issue here.

To the extent petitioner challenges the direct findings of the court of appeals on a factual issue fully briefed and argued below, his petition plainly does not warrant further review. The court of appeals' conclusion was correct.

Petitioner relies upon Govt. Exh. 44 (Pet. 11a)—a $1,000 check dated December 24, 1959, payable to cash, drawn on the account of the new Palmer, and endorsed by petitioner—for the theory that the jury may have convicted him on the challenged evidence. But the government's summary for 1959 did not include this item (R. 572–574, 578–579, 582–585); the only relevant testimony was that it was chargeable to petitioner in

the year 1960 (R. 466–468).[3] In both his opening statement and his summation (R. 29, 796–797) the prosecutor referred to the disallowed business expense deductions, including this check, as relating to 1960 and thereafter. And in instructing the jury on the theory on which they could convict on count 2, the trial judge made it clear to them that the only unreported income which the government claimed for 1959 was that attributable to the check to Kaplan and the inventory price differential (R. 850):

> In the event that you should conclude that no part of the $13,000 or of the difference in value or price of the inventory, which the Government claims was about $42,000, should have been included by Proner in his adjusted gross income for the year 1959, then you would find the defendants not guilty of the charges against them in Count 2 of the indictment.

Thus, unless the jury ignored the evidence, counsel's arguments, and the court's instructions, it could not have convicted petitioner of tax offenses relating to 1959 in reliance on the challenged evidence.

2. Nor is there merit in the contention (Pet. 16) that the prosecutor erred in vouching for the credibility of a government witness. No objection was made at the trial and, as the court below found (Pet. 6a–7a),

[3] The new Palmer operated on a fiscal year running from October through September, and therefore its fiscal year included three months of the previous calendar year. It is clear, however, that all of the corporation's disallowed business deductions for its fiscal year ending in 1960 were treated as income to petitioner for the calendar year 1960, and none were treated as income to him for 1959. Both petitioner and the new Palmer agreed that such disallowed items would be so treated (R. 468–469).

the defense opened the door to the remark by claiming in the course of its summation that the prosecutor had remained silent even though he knew the witness was lying on the stand. See *Lawn* v. *United States*, 355 U.S. 339, 359–360, n. 15.

3. There remains the question whether the court's conclusion that the challenged evidence did not affect the convictions on counts 2 and 3 was a sufficient basis for its application of the concurrent sentence doctrine. The question whether that doctrine has continuing validity is now before this Court in *Benton* v. *Maryland*, No. 201, this Term, and it would be appropriate to defer action on this petition until decision in that case. The United States is participating as *amicus curiae* in *Benton* by invitation of the Court; we respectfully refer the Court to the views we have set forth at length in our Brief in that case.

As we there elaborate, it is our view that an appellate court may deny review to issues affecting less than all counts on which concurrent sentences have been imposed after a single trial if convictions on other counts are affirmed, *unless* it is shown that the unreviewed counts will impose independent legal consequences on the accused. The court of appeals has found that the disallowed business deduction issue reaches less than all counts on which petitioner was convicted and sentenced, and has affirmed the unaffected counts. Thus, the only question remaining is whether in fact there were collateral legal consequencs.

Petitioner alleges (Pet. 11–12) that he will be estopped in civil proceedings to deny both his tax

liability and the existence of fraud with respect to 1960–1964, the years covered by the unreviewed counts. We agree that any such estoppel would constitute a collateral legal consequence entitling an accused to full review. However, there would be no estoppel as to fraud here; unlike the amounts owed in the cases petitioner cites, the amounts he owes for 1960–1964 do not constitute a tax on which a 50% civil fraud penalty could be levied under I.R.C. 6653(b)—they are sums due under the compromise settlement. Nor is there an estoppel as to the principal amount due under that offer. "Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action." A.L.I. Restatement, *Judgments,* Sec. 69(2); *Allegheny County* v. *Maryland Casualty Co.,* 146 F.2d 633, 637 (C.A. 3), certiorari denied, 325 U.S. 855; *Worcester* v. *Commissioner,* 370 F. 2d 713, 718–719 (C.A. 1); cf. *International Refugee Organization* v. *Republic S.S. Corp.,* 189 F.2d 858, 862 (C.A. 4). In short, since the court below did not pass upon these counts, the judgment is not final for purposes of collateral estoppel; and if a judgment of conviction is not final so far as the rules of collateral estoppel are concerned, it is not final for purposes of admissibility into evidence in a subsequent cause of action. Cf. *Fifth and Walnut* v. *Loew's Incorporated,* 176 F.2d 587, 592–593 (C.A. 2), certiorari denied, 338 U.S. 894; *International Shoe Mach. Corp.* v. *United Shoe Mach. Corp.,* 315 F.2d 449, 454 (C.A. 1), certiorari denied, 375 U.S. 820.

We conclude that there is no need for the court of appeals to review Counts 4 through 8 since the failure to review them carries with it no collateral consequences which may prejudice petitioner.[4]

4. Finally, we note that once the court below had found that counts 2 and 3 would be unaffected by any error as to the remaining counts, it concluded that it "must" affirm the judgment of conviction regardless of any such error (Pet. App. 6a). As we indicate in our *Benton* brief, we do not believe the concurrent sentence doctrine to be mandatory upon reviewing courts; it is, rather, a doctrine of judicial convenience and sound administration which need not be invoked when reason to review all counts appears. Since the Second Circuit itself has stressed this discretionary aspect of the doctrine (*e.g., United States* v. *Hines,* 256 F.2d 561, 562–563), it may be doubted whether the present opinion is properly to be read as indicating that the court viewed itself as jurisdictionally or otherwise *disabled* from reaching the other counts. Nor is there any basis for supposing that the court would have acted differently as a matter of discretion. Nevertheless, if *Benton* is decided consistently with our submission in that case, it might be appropriate to vacate the judgment in this case and

[4] We do not believe it follows, as petitioner urges, that if he obtains a partial reversal he is *entitled* to be resentenced on the affirmed counts. Such relief lies within the discretion of the appellate court, but would be appropriate only if that court believed the reversals undercut the trial court's sentencing decision. That is unlikely to be its view here, since the 1959 transactions constituted the most egregious of the violations of tax law and petitioner's understanding with the Internal Revenue Service.

remand the case to the court of appeals for reconsideration in light of this Court's opinion.

Respectfully submitted.

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